Supreme Court, U.S.
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Case No. 95-1672

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

ROSA WARE, BOOKER T. WADE, JR., GWENDOLYN MAY-BARLOW, AND HOPE SMITH BYNUM, Joint Cross-Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the actions of the Federal Communications Commission in sequestering Rosa Ware, a natural person and party, from adverse witnesses at an administrative hearing are in conflict with Rule 615 (1) of the Federal Rules of Evidence and thus denied her "due process"?

Whether the Federal Communications Commission improperly disqualified Rosa Ware, Gwendolyn May-Barlow, and Hope Smith Bynum, although not finding them to have personally engaged in disqualifying misconduct, but merely associated with Booker T. Wade, Jr., whom was found to have engaged in disqualifying misconduct?

Whether the Federal Communications Commission, in conflict with precedent of this Court, improperly failed to use the "preponderance of [substantial] evidence" standard in disqualifying Booker T. Wade, Jr., and other parties to an administrative hearing and thus denied them "due process"?

Whether the Federal Communications Commission denied "due process" to Booker T. Wade, Jr., by disqualifying him based upon allegations in which he had no notice and thus improperly engaged in a "trial by ambush"?

Whether the Federal Communications Commission denied "due process" to Booker T. Wade, Jr., by disqualifying him based upon supposed representations by him which are not in the record?

Whether the Federal Communications Commission denied "due process" to Rosa Ware, Booker T. Wade, Jr., Gwendolyn May-Barlow, and Hope Smith Bynum by disqualifying them based upon a supposed FCC policy which does not exist?

PARTIES TO THE PROCEEDING

The following persons were also parties to the appeal before the United States Court of Appeals for the D.C. Circuit whose judgment is sought to be reviewed:

Black Television Workshop
of Los Angeles, Inc.
Mary V. Woodfork

The following persons were named as parties to the FCC proceeding on review, but did not appeal their disqualification to the U.S. Court of Appeals:

Dr. Clint Wilson
Gary Cordell
Roy Campanella, Jr.
Linda Pate
Titilola Payne Parker
Jerrome Duncan

Black Television Workshop of Los Angeles, Inc. was not named as a party to the FCC proceeding, but did participate as a party in the appeal to the U.S. Court of Appeals for the D.C. Circuit.

Black Television Workshop of Los Angeles, Inc. is a California non-profit and non-stock corporation, which was incorporated in 1981. It is governed by a multi-member board of directors. The corporation is not publicly owned, nor is it affiliated with any other entity. It has no parent

publicly issued. The sole activity of the corporation is to engage in television broadcasting. On October 3, 1994, the corporation filed for bankruptcy protection in the Federal Bankruptcy Court for the Central District of California. On February 23, 1995, the case was converted to Chapter 7 and Arnold L. Kupetz, Esq. was named Trustee (Case No. SV 94-45938KL).

The cross-petitioners, Rosa Ware, Booker T. Wade, Jr., Gwendolyn May-Barlow, and Hope Smith Bynum are natural persons and have served as officers and directors of Black Television Workshop.

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OPINIONS BELOW

The decisions of the Federal Communications Commission ("FCC"), and the interlocutory order, final judgment, and orders on rehearing and hearing in banc of the U.S. Court of Appeals for the D.C. Circuit, denying the relief requested by the joint cross-petitioners are cited in the Table of Authorities herein. The decisions are included in the Appendix of petitioner Black Television Workshop of Los Angeles, Inc. (docketed April 17, 1996). The orders and judgment of the D.C. Circuit are unreported.

The Appendix submitted by Black Television Workshop is cited herein as (BTW App.). The joint cross-petitioners are also submitting a Joint Appendix in a separate volume. It is cited herein as (Jt. App.).

JURISDICTION

The FCC entered a final decision in this proceeding in Order, FCC 94-220, rel. September 1, 1994, 9 FCC Rcd 4477, which disqualified the cross-petitioners as broadcast permittees or licensees. The Order of the FCC also revoked the construction permit for non-commercial Channel 68, Los Angeles, California, which is held by Black Television Workshop of Los Angeles, Inc. The cross-petitioners serve as directors of the corporation (Jt. App. 108a).

A timely appeal of the Order of the FCC was filed with the U.S. Court of Appeals for the D.C. Circuit. It entered an interlocutory order on December 5, 1994, denying the cross-petitioners' motion for summary reversal of the decisions of the FCC as to their individual qualifications to be broadcast permittees or licensees (BTW App. 1a-3a).

A final judgment in the case was entered on September 18, 1995, which denied the appeal of the cross-petitioners and which upheld the revocation of the Channel 68 construction permit. A petition for rehearing and suggestion for hearing in banc was denied on November 17, 1995 (Case No. 94-1031 and Consolidated Case No. 94-1655) (BTW App. 5a-11a).

Black Television Workshop of Los Angeles, Inc., a party to the proceeding, timely filed a petition for writ of certiorari on February 14, 1996. By letter of February 15, 1996, the Clerk granted Black Television Workshop leave to refile its petition by April 15, 1996. The petition was refiled by that date and docketed on April 17, 1996.

The jurisdiction of this Court was timely invoked by Black Television Workshop, pursuant to 28 U.S.C. Section 1254 (1). The cross-petitioners rely upon U.S. Supreme Court Rule 12.5 to file their cross-petition, which is timely filed by May 17, 1996. The Solicitor General and the FCC have been served with this cross-petition.

STATUTORY AND OTHER PROVISIONS INVOLVED

The statutory and other provisions cited herein, which are 47 U.S.C. 309, 47 U.S.C. 312, 47 C.F.R. 1.351, and Rule 615 (1) of the Federal Rules of Evidence, are set forth in the Joint Appendix (Jt. App. 121a-124a).

STATEMENT OF THE CASE

In Order to Show Cause, Hearing Designation Order, and Notice of Apparent Liability ("HDO"), 3 FCC Rcd 5443 (1988), the FCC designated for revocation the construction permit of Black Television Workshop of Los Angeles, Inc. ("Workshop") (Jt. App. 110a-116a). It is a non-stock and non-profit corporation governed by a multi-member board of directors. All of the directors are African-Americans (BTW App. 13a-18a).

The FCC granted to the corporation in 1983 the construction permit for non-commercial television Channel 68 in Los Angeles. This would be the only minority-controlled non-commercial television station in Los Angeles, which has one of the highest concentrations of minorities of any major metropolitan area. The construction permit was not granted pursuant to a minority preference policy (BTW App. 13a-18a).

The HDO was based upon a purported unauthorized transfer of control and unauthorized control of the corporation because of a change and/or deletion of directors without prior FCC approval (Jt. App. 110a-111a). However, the FCC has no articulated policy to determine whether a change and/or deletion of directors of a non-profit and non-stock entity results in a legally cognizable transfer of control or violates FCC rules. Transfers of Control of Non-Stock Entities, 4 FCC Rcd 3403 (1989).

The HDO resulted from the allegations of Mary V. Woodfork to the FCC Woodfork claimed that she was

unfairly removed as a director of the corporation in 1986. According to Woodfork, her removal was the result of the actions of Booker T. Wade, Jr., who had been serving as counsel to the corporation and later as an officer and director (Jt. App. 117a-120a). Wade had previously served as a Legal Assistant to an FCC Commissioner (Jt. App. 5a). He is one of the joint cross-petitioners herein.

The HDO also specified general issues of misrepresentation and/or lack of candor against Wade, Woodfork, and all of the current and former directors of the corporation. These persons are Rosa Ware, Gwendolyn May-Barlow, and Hope Smith Bynum, who are the other joint cross-petitioners herein, and Gary Cordell, Dr. Clint Wilson, Roy Campanella, Jr., Titilola Payne Parker, Linda Pate, Esq., and Jerrome Duncan, Esq. (Jt. App. 110a-116a).

Ware has continuously served as a director of Workshop since formation of the corporation in 1981. She is the sister of Wade. May-Barlow and Bynum began serving as directors in 1987. Woodfork, one of the original directors, disputes the election of May-Barlow and Bynum (Jt. App. 7a; BTW App. 110a-116a).

The specified issues resulted from Woodfork's generalized and undocumented allegations of attorney misconduct by Wade. The HDO failed to specify what misrepresentations or candorless statements may have been made or who made them (Jt. App. 110a-116a).

The Mass Media Bureau ("MMB") of the FCC issued a Bill of Particulars, on October 11, 1988. However, the

MMB failed to specify any allegations of misrepresentation, lack of candor, or other FCC misconduct by Ware, May-Barlow, or Bynum, which would justify their individual or personal disqualification. All of the purported misconduct by Wade is prior to the time that May-Barlow and Bynum became directors in 1987 (Jt. App. 117a-120a).

The HDO placed the burden of proceeding with the evidence and the burden of proof on the FCC. This is required by 47 U.S.C. 312 (d) (Jt. App. 112a, 124a).

The MMB, which prosecuted the case, assumed the burden of proceeding with the evidence and the burden of proof for the FCC. It directed its case against Wade and focused on his purported misconduct as an attorney for the corporation. The primary witness against Wade was Woodfork (Jt. App. 1a-40a).

Woodfork's accusations are related to a supposed scheme first conceived by Wade in 1981 to take control of the corporation and to oust her as a director in 1986. Woodfork has demanded that the FCC determine May-Barlow and Bynum not to be legitimate directors of the corporation because they are associated with Wade. Woodfork considers herself to be the "true owner" of the corporation (Tr. 711-712, 910, 924-928).

Woodfork demanded that the FCC not allow Channel 68 to operate under the control of persons she considers illegitimate. She wanted the FCC to award her as an individual the construction permit for Channel 68. This is because in her view she exposed Wade's purported

wrongdoing in ousting her as a director of the corporation (Tr. 910, 927-928).

During pre-designation investigations and pre-hearing discovery, in the 1987-1992 time period, the FCC failed to depose Woodfork or any other prospective witnesses against Wade, or to preserve the testimony of any prospective witnesses adverse to Wade. The FCC had no notes as to interviews with Woodfork or other prospective witnesses (Tr. 153, 207-208).

During pre-hearing discovery, the MMB declined to depose Ware, May-Barlow, and Bynum. However, as parties to the proceeding, they produced voluminous corporate documents in response to requests for production of documents from the MMB. Prior to designation for hearing, they assisted in providing voluminous corporate documents to the FCC in response to its investigation of the corporation.

At the hearing, the MMB declined to call May-Barlow and Bynum to testify. No evidence was adduced at the hearing that either May-Barlow or Bynum engaged in any misrepresentation or lack of candor, or other disqualifying misconduct (Jt. App. 1a-40a).

Ware testified at the hearing at the request of the MMB. During the hearing, the ALJ sequestered Ware from Woodfork and other adverse witnesses and ordered her counsel not to disclose to her any testimony by adverse witnesses (Tr. 493-517).

The purpose of this tactic was to prevent Ware from knowing the testimony of Woodfork until after Ware had testified. The MMB had refused to disclose, prior to the hearing, the testimony of Woodfork, or other witnesses adverse to Ware.

Wade did not testify at the hearing. The MMB, which had the burden of proceeding with the evidence and the burden of proof, failed to subpoena him. The MMB declined to move to dismiss Wade as a party to the proceeding, even though the ALJ directed it to file such a motion (Tr. 1590, 1831-1832). The MMB further declined to submit into evidence Wade's deposition testimony and answers to interrogatories, even though directed to do so by the ALJ (Tr. 1586-1589, 1802, 1807-1808).

In the Initial Decision ("I.D."), 7 FCC Rcd 7819 (1992), the ALJ uncritically accepted at face value the testimony of Woodfork which demonized Wade as engaging in purported misconduct by assuming control of the corporation and in ousting her as a director. This testimony was first given in 1992 and relates to events in the 1981-1986 time period (Jt. App. 1a-40a).

The I.D., paras. 110-118, made conclusions of misrepresentation and lack of candor by Wade, but contains no citations to the record of any evidence of intent to deceive of knowledge of any falsity. Although Wade did not testify, he was disqualified as a FCC permittee (Jt. App. 49a-53a).

The I.D. revoked the construction permit of the corporation. This was because of a purported abdication of

control to Wade by the directors and/or unauthorized transfer of control of the permit by Wade resulting from a change of directors without prior FCC approval. I.D., para. 124 (Jt. App. 55a-56a).

The I.D. disqualified as individual FCC permittees or licensees all of the former and current directors. This included Ware, May-Barlow, and Bynum. Such blanket disqualification also included two former directors who were not deposed by the MMB and were not called to testify at the hearing. Those persons never participated in the proceeding as parties and thereby failed to appeal their disqualification. I.D., paras. 121, 124-127 (Jt. App. 54a-56a).

The I.D., paras. 121, 125-127, disqualified Ware for abdication of control of the permittee and/or assisting in an unauthorized transfer of control without prior FCC authorization. No findings or conclusions as to misrepresentation or lack of candor, or other disqualifying misconduct, by Ware were made. No findings or conclusions of intent to deceive, or knowledge of any falsity, by her were made (Jt. App. 1a-40a, 55a-56a).

The I.D., paras. 121, 124-127, disqualified May-Barlow and Bynum. No findings or conclusions as to misrepresentation or lack of candor, or disqualifying misconduct, by them were made. No findings or conclusions of intent to deceive, or knowledge of any falsity, by them were made. The I.D. failed to give any intelligible reason for their disqualification (Jt. App. 1a-40a, 55a-56a).

All of the findings and conclusions of the I.D. relate

to purported attorney misconduct by Wade in the 1981-1986 time period. This was before May and Bynum became directors of the corporation in 1987 (Jt. App. 1a-40a).

Even though the I.D. found that Wade had acted without authority from the corporation and was not an officer and director at the time, it nevertheless attributed his purported attorney misconduct to the corporation and its directors. However, no findings or conclusions were made against the corporation or its directors as to any disqualifying misconduct or intentional deceit. I.D., paras. 114, 117, and 121-131 (Jt. App. 51a, 53a, 55a-58a).

At the time of giving testimony against Wade at the 1992 hearing, Woodfork was not represented by counsel. Woodfork believed that she would be personally awarded the Channel 68 construction permit, if Wade was discredited. Neither the ALJ, nor the MMB hearing counsel, informed Woodfork at the hearing that she was a target for prosecution or disqualification (Jt. App. 1a-40a).

Woodfork was thereafter disqualified in the I.D., paras. 130-131, based upon her own testimony against Wade (Jt. App. 57a-58a). After being disqualified, Woodfork retained counsel and attempted to revise and recant her hearing testimony in post-hearing pleadings.

The FCC in Decision, 8 FCC Rcd 4192 (1993), affirmed the I.D. The disqualification of Ware was affirmed, at para. 28, because of abdication of control of the permittee. However, no findings or conclusions of misrepresentation or lack of candor, or disqualifying

misconduct, by her were made. No findings or conclusions of intent to deceive, or knowledge of any falsity, by her were made. Ware was only found not to be a credible witness. Decision, para. 9. (Jt. App. 1a-40a, 68a).

The Decision, paras. 11-13, 28, and n. 53, affirmed the disqualification of May-Barlow and Bynum. However, no intelligible reasons were given. No findings or conclusions of misrepresentation or lack of candor, or disqualifying misconduct, by them were made. No findings or conclusions of intent to deceive, or knowledge of any falsity, by them were made (Jt. App. 1a-40a, 72a, 90a-91a).

Reconsideration of the Decision was denied in Memorandum Opinion and Order ("MO&O"), 8 FCC Rcd 8719 (1993). It declined to address the issue as to whether there is any factual or legal basis for the disqualification of Ware, May-Barlow, and Bynum (Jt. App. 94a-103a).

The MO&O, n. 11, suggested for the first time that Ware, May-Barlow, and Bynum were actually disqualified because of their supposed non-cooperation in the pre-designation investigation and their supposed disruption of the hearing (Jt. App. 102a). The MO&O failed to acknowledge that the hearing, which was held in downtown Los Angeles, was disrupted because of riots during the week of April 27-30, 1992. This resulted in several witnesses and named parties not appearing to testify and in the hearing being suspended in order to evacuate from the city.

Reconsideration of the MO&O was requested because the FCC relied upon a new rationale for disqualification.

This appeal was dismissed by the General Counsel, acting pursuant to delegated authority. Order, FCC 94I-013, rel. Feb. 15, 1994 (Jt. App. 104a-107a).

There was no substantive discussion in the Order as to the issues raised on reconsideration. The Order, para. 8, did state, but without any explanation, that because Ware, May-Barlow, and Bynum abdicated control of the permittee, they are culpable for whatever misconduct by Wade which occurred (Jt. App. 106a).

Because FCC rules prohibit an appeal to the Court of a delegated action by the staff, an application for review was filed with the FCC. The application for review was denied without comment in Order, FCC 94-220, rel. September 1, 1994, 9 FCC Rcd 4477 (Jt. App. 108a-109a).

Ware, Wade, May-Barlow, and Bynum timely appealed on October 3, 1994, their individual disqualification and also appealed the revocation of the construction permit to the U.S.Court of Appeals for the D.C. Circuit (Case No. 94-1655). A separate appeal had previously been filed by Woodfork as to her individual disqualification (Case No. 94-1031). The jurisdiction of the D.C. Circuit was pursuant to 47 U.S.C. 402 (b) (1), (5), and (6).

On October 3, 1994, Workshop, as a corporation, filed for Federal bankruptcy protection. On February 23, 1995, the case was converted to Chapter 7. Arnold L. Kupetz, Esq. was appointed Trustee (Case No. SV 94-45938KL, Central District of California). The intent of Kupetz is to sell the construction permit to a third-party

unrelated to the former or current directors in order to pay creditor claims of over $2,000,000 (BTW App. 19a-20a).

On September 18, 1995, the D.C. Circuit entered a final judgment denying the appeals. It held that there was "ample evidence" on the record to support the FCC's decision that the Channel 68 construction permit should be revoked and that Ware, Wade, May-Barlow, and Bynum are disqualified from "inheriting" the permit. A petition for rehearing and hearing in banc was denied on November 17, 1995 (BTW App. 5a-7a, 10a-11a).

Kupetz, as Trustee, filed on February 14, 1996, a petition for certiorari, on behalf of the corporation. It was docketed on April 17, 1996. The purpose of that petition is to require the FCC to abide by its policies and by Federal bankruptcy policy, which would allow the sale of a revoked broadcast permit to a third-party unrelated to the former or current directors in order to protect creditors.

This cross-petition of Ware, Wade, May-Barlow, and Bynum is with respect to their personal and individual qualifications to be an FCC broadcast permittee or licensee. They made no claim to the D.C. Circuit that they were attempting to "inherit" the Channel 68 construction permit from the bankruptcy Trustee and make no such claim to this Court. Their grievance before this Court is reputational injury and the redemption of their qualifications to be an FCC permittee or licensee of other broadcast stations.

SUMMARY OF ARGUMENTS

The FCC revoked the construction permit for what would only be the second African-American owned and controlled non-commercial television station in the nation. The FCC also disqualified all of its directors, who are African-Americans.

The revocation proceeding was initiated by the FCC in 1988 based upon changes in the directors of a non-profit corporation, which violate no FCC regulation and which are the subject of a pending rule making to determine if such changes should be regulated at all, or subject to a reporting requirement. The revocation proceeding was also initiated based upon conclusory and unspecified allegations of misrepresentation and lack of candor.

No specific allegations of deceit were made until after the hearing commenced in 1992 and relate to events in the 1981-1986 time period. The FCC declined to preserve any pre-hearing testimonial evidence from its witnesses. At the beginning of the hearing, the FCC refused to disclose the testimony of its witnesses and it sequestered parties from the adverse testimony of its witnesses. This was done to prevent the parties from knowing the specific allegations against them until after they testified.

The FCC based its case upon the testimony of Mary V. Woodfork, a dissident former director of the corporation. Woodfork believed that she would be personally awarded the FCC permit for the station as a reward for her testimony against Booker T. Wade, Jr., the corporation's legal counsel.

However, Woodfork was disqualified by the FCC based upon her own testimony against Wade. She was not represented by counsel at the hearing and was not advised by the ALJ or FCC counsel that she was a target for prosecution or disqualification. After the hearing, Woodfork retained counsel and attempted to revise and recant her testimony in post-hearing pleadings.

This case is actually about the FCC sanctioning Wade, an African-American, and one of its former attorneys and former Legal Assistant to an FCC Commissioner, because it disapproved of the manner in which he represented the non-profit corporation as legal counsel. The FCC believed that Wade was attempting to get rich from a broadcast permit and only "had his self-interest in mind" (Jt. App. 42a).

In a fit of pique, the FCC concluded that the directors had either encouraged Wade's involvement, as legal counsel, in the affairs of the corporation, or had done nothing about it, and thus themselves deserved punishment. The FCC, acting in a "blunderbuss," then punished the corporation and its directors by revoking its broadcast permit and disqualifying them.

The actions of the FCC were taken under the pretense of preventing a transfer of control of the corporation to Wade, as legal counsel, which was not authorized or approved by it in advance. The actions of the FCC were also taken under the pretense of punishing a supposed failure to inform it that such a transfer of control to Wade, as legal counsel, had occurred.

The FCC repeatedly violated its own rules, policies, and procedures in its vendetta to publicly humiliate Wade for committing the perceived "sin" of attempting to get rich from a broadcast permit. It conducted an extralegal "star chamber" proceeding against Wade, in what was also an attorney disciplinary proceeding against him as a former FCC employee. Such a cavalier disregard by the FCC for the "due process" rights of Wade and other petitioners, Ware, May-Barlow, and Bynum, requires that certiorari be granted.

REASONS FOR GRANTING THE PETITION

(a) The petition for writ of certiorari raises an important Federal question of law as to whether the actions of the FCC in sequestering Rosa Ware, a natural person and party, from adverse witnesses at the administrative hearing are in conflict with Rule 615 (1) of the Federal Rules of Evidence and thus denied her "due process"?

The petition for writ of certiorari raises an important Federal question of law as to whether the actions of the FCC in sequestering Rosa Ware, a natural person and party, from adverse witnesses are in conflict with Rule 615 (1) of the Federal Rules of Evidence. Such rules of evidence apply to FCC administrative hearings, pursuant to 47 C.F.R. 1.351. Because the actions of the FCC are in conflict with the Federal Rules of Evidence, certiorari should be granted.

During the hearing, the ALJ improperly sequestered Ware from Mary V. Woodfork, an adverse witness, and ordered Ware's counsel not to inform her of the testimony of

such adverse witnesses (Tr. 493-517). This action by the ALJ is in patent conflict with the Federal Rules of Evidence, Rule 615 (1), which allows a party who is a natural person to be present at all times to confront adverse witnesses.

Exemption from sequestration is automatic and not a matter of discretion. The purpose of Rule 615 (1) is to prevent problems as to confrontation and "due process" which would otherwise arise. Weinstein's Evidence, Vol. 3, Section 615 [02]; Advisory Committee's Note to Rule 615.

The refusal of the FCC to protect Ware's rights, as codified in the Federal Rules of Evidence, requires that her disqualification be vacated. Varlack v. SWC Caribbean, Inc., 550 F.2d 171, 175-176 (3rd Cir. 1977). Ware was disqualified as a result of the testimony of Woodfork.

The arguments of the FCC in rationalizing Ware's sequestration are inapposite (Jt. App. 70a-71a). According to the FCC, an individual testifying at an administrative hearing may be sequestered where that individual's presence is not necessary for the effective advocacy of the cause.

However, Ware was a party to the hearing and her own personal qualifications were under challenge. She had a right to be present to confront adverse witnesses in order to effectively advocate her own cause. See, Geders v. U.S., 425 U.S. 80, 88 (1975), the petitioner is not simply a witness, but also a defendant.

The reliance of the FCC on NLRB v. Stark, 525 F.2d 422, 429-430 (2nd Cir. 1975), cert. denied, 424 U.S. 967

(1976) is wholly misplaced. There, the persons to be sequestered were complainants, not parties subject to sanctions as is the case with Ware.

The FCC further argues that Ware was not prejudiced by sequestration from Woodfork or other adverse witnesses because she could have discussed their testimony with her counsel after she testified and then offered rebuttal evidence. However, this could be done by any party who is sequestered. If such procedure is effective to alleviate prejudice, then there would be no need to exclude any party from sequestration.

Accordingly, certiorari should be granted. The actions of the FCC are in conflict with the Federal Rules of Evidence and with precedent of other Circuits. The D.C. Circuit failed to address this issue of improper sequestration, although it was timely raised before the FCC and that Court.

> (b) The petition for writ of certiorari raises an important Federal question of law as to whether the FCC improperly disqualified or sanctioned Rosa Ware, Gwendolyn May-Barlow, and Hope Smith Bynum, although not finding them to have personally engaged in disqualifying misconduct, but merely associated with Booker T. Wade, Jr., who was found to have engaged in disqualifying misconduct?

The petition for writ of certiorari raises an important Federal question of law as to whether the FCC violates the

"due process" rights of parties to its administrative hearings by disqualifying or sanctioning them for the misconduct of other parties merely because of their association with the offending party. A Federal agency must conduct its proceedings in accordance with "due process." Goldberg v. Kelly, 397 U.S. 254, 266-267 (1970). The failure to do so requires that certiorari be granted.

The decisions of the FCC made no findings that Ware, May-Barlow, or Bynum personally engaged in any disqualifying misconduct. Indeed, the FCC, which had the burden of proceeding with the evidence and the burden of proof, declined to call May-Barlow and Bynum to testify at the hearing and did not put into the record any evidence adverse to them (Jt. App. 1a-40a). Ware, who was called to testify, was only found not to be a credible witness (Jt. App. 19a, 24a, 53a, 68a).

The FCC nevertheless disqualified Ware, May-Barlow, and Bynum because of their association with Booker T. Wade, Jr., who was the focus of the FCC's prosecution. Ware is the sister of Wade. May-Barlow was presumed to be Wade's cousin (Jt. App. 7a, 73a).

The decisions of the FCC repeatedly referred to Ware, May-Barlow, and Bynum as the "Wade Group." No meaningful attempt was made to distinguish the actions of Wade from their actions (Jt. App. 59a, 65a, 102a, 106a).

The findings and conclusions of the decisions of the FCC as to purported misconduct by Wade refer to the 1981-1986 time period. They do not address the period of time

(after 1986) in which May-Barlow and Bynum served as directors of the corporation (Jt. App. 1a-40a).

A Federal agency must "engage in a careful, individualized review of the evidence." Rhoa-Zamora v. INS, 971 F.2d 26, 33 (7th Cir. 1992), citing Kaczmarczyk v. INS, 933 F.2d 588, 595 (7th Cir. 1991), cert. denied, 112 S.Ct. 583 (1991). The failure of the FCC to do so requires that the disqualification of Ware, May-Barlow, and Bynum be vacated.

In order to justify disqualification, the FCC must establish the existence of misrepresentation or deceit by demonstrating the making of an intentional, material, and false statement by a party. High Country Communications, 4 FCC Rcd 6237, 6238, para. 9 (1989). A party must have knowledge of falsity in order to have intent to deceive. California Public Broadcasting Forum v. FCC, 752 F.2d 670, 679 (D.C. Cir. 1985).

There is no record evidence, or any findings or conclusions, of any knowingly false or misleading testimony presented to the FCC by Ware, May-Barlow, or Bynum. Nor is there any record evidence that information was intentionally withheld from the FCC by them, that inaccurate information was intentionally provided by them to the FCC, or that they had any knowledge of falsity (Jt. App. 1a-40a).

The FCC has itself cautioned against branding potential broadcasters as "liars," or of unfit character to be a permittee or licensee, without seeking or considering their explanations. This is especially so in contentious cases, such

as the one at hand. Bellingham Television Associates, Inc., 103 FCC2d 222, 225, para. 6 (Rev. Bd. 1986).

The actions of the FCC in disqualifying Ware, May-Barlow, and Bynum are particularly shameful because these persons who are the victims of its "blunderbuss" are African-American females. The policy of the FCC is to bring more minorities and women into broadcasting.

However, without any factual or legal basis, the FCC disqualified three African-American females from holding a broadcast permit or license. This would also disqualify them from holding a management position at a broadcast station. Such disqualification further stigmatizes them as being of unfit character, which would have an adverse effect on their credit rating, general employment prospects, and on their eligibility for licensing as professionals.

Accordingly, certiorari should be granted. The actions of the FCC are in conflict with fundamental principles of "due process" and with precedent of other Circuits requiring an "individualized" review of the evidence, not guilt by association or guilt by reason of "blood." The D.C. Circuit failed to address this issue, although it was raised by Ware, May-Barlow, and Bynum both before the FCC and that Court.

> (c) The petition for writ of certiorari raises an important Federal question of law as to whether the FCC, in conflict with precedent of this Court, improperly failed to use the "preponderance of [substantial] evidence" standard in disqualifying Booker T. Wade, Jr. and other parties to the administrative hearing and thus denied them "due process"?

The petition for writ of certiorari raises an important Federal question of law as to whether the FCC improperly failed to use the "preponderance of [substantial] evidence" standard in disqualifying Wade and other parties to the administrative hearing. The actions of the FCC are in direct conflict with Steadman v. SEC, 450 U.S. 91, 101 (1981).

As held in Steadman, in order for a Federal agency to impose sanctions, it must demonstrate disqualifying misconduct by a "preponderance of [substantial] evidence" and not by mere "substantial evidence." The FCC has acknowledged that, where it has the burden of proceeding with the evidence and the burden of proof, it must demonstrate that it is more likely than not that a party engaged in disqualifying misconduct and not merely infer that such misconduct occurred. Silver-Star Communications-Albany, Inc., 6 FCC Rcd 6905, 6906, para. 18 (1991).

However, in spite of this clear mandate from the Court as to the appropriate legal standard of proof to impose sanctions and its own acknowledgement of that legal standard, the FCC used the lesser "substantial evidence" standard against Wade and the other parties. In its brief

before the D.C. Circuit, the FCC admitted that it used this lesser standard. See, FCC appellee brief, pp. 22-25, filed May 18, 1995.

As defined by the FCC in its appellee brief, the "substantial evidence" standard only minimally requires it to find such relevant evidence in the record to support its decisions which a reasonable mind might accept as adequate to support a conclusion. Lindsay v. NSTB, 47 F.3d 1209, 1213 (D.C. Cir. 1995). As held in Consolo v. FMC, 383 U.S. 607, 620 (1966), "substantial evidence" is something less than the weight of the evidence.

Wade, Ware, May-Barlow, and Bynum raised on appeal the issue as to the appropriate evidentiary standard to use. The D.C. Circuit, in its Judgment, filed September 18, 1995, did not directly address this issue. Rather, it stated without explanation that there is "ample evidence" in the record to support the decisions of the FCC (BTW App. 6a-7a). However, an "ample evidence" standard has no legal meaning and the D.C. Circuit gave it none.

Accordingly, certiorari should be granted. The actions of the FCC are in conflict with precedent of this Court as to the proper legal standard of evidence or proof for a Federal agency to impose sanctions against a party.

(d) The petition for writ of certiorari raises an important question of Federal law as to whether the FCC denied "due process" to Booker T. Wade, Jr., by disqualifying him based upon allegations in which he had no notice and thus improperly engaged in a "trial by ambush"?

The petition for writ of certiorari raises an important Federal question of law as to whether the FCC denied "due process" to Wade by disqualifying him based upon allegations in which he had no notice and thus engaged in a "trial by ambush." From the beginning of this proceeding, the FCC prosecuted its case based upon secrecy and surprise.

Pursuant to 47 U.S.C. 309 (e), a hearing designation order shall specify with particularity the matters and things in issue and shall not include issues phrased generally. Univision Holdings, Inc., 8 FCC Rcd 3931, para. 3, 3932, paras. 6-7 (1993), general conclusory allegations are not acceptable. However, in violation of this Federal statutory requirement, the HDO only contained general conclusory allegations of misconduct against Wade. The bill of particulars was only slightly less vague (Jt. App. 110a-120a).

After designation for hearing in 1988, the FCC declined to take written statements or depositions from its witnesses. At the beginning of the hearing in 1992, the FCC refused to disclose the testimony of its witnesses. It also required the sequestration of Wade and Ware from adverse witnesses. This was done in order to prevent Wade and

Ware from knowing the testimony to be used against them.

The FCC based its case on the testimony of Woodfork. She first testified in 1992 as to events in the 1981-1986 time period. She had no notes from that period. When Woodfork first made complaints in 1987 to the FCC about Wade, it failed to take any effort to preserve her oral claims or testimonial evidence.

Woodfork alleged for the first time at the 1992 hearing, that Wade directed her in 1986 to sign in blank an FCC ownership report. Wade was disqualified for fraud and intentional misrepresentation based upon this allegation in which he had no prior notice (Jt. App. 29a, 51a). His purported fraud and misconduct was then attributed to Ware, May-Barlow, and Bynum, and the other parties (Jt. App. 56a, 106a).

These trial tactics by the FCC are in conflict with fundamental principles of "due process" and with precedent of this Court. In Re Ruffalo, 390 U.S. 544, 551 (1968), an agency is required to inform the accused of the charges before the hearing commences and cannot amend the charges on the basis of testimony it later elicits at the hearing.

Trials are not poker games in which prosecutors can conceal their cards until played. Williams v. Florida, 399 U.S. 78, 82 (1970). See also, Smith v. Estelle, 602 F.2d 694, 699 (5th Cir. 1979), surprise and secrecy by prosecutors prevent effective cross-examination by defendants in challenging the accuracy or materiality of evidence and thus cannot be condoned.

Accordingly, certiorari should be granted. The FCC must not be allowed to conduct a "trial by ambush." Not only do such tactics offend the Fifth Amendment requirement of "due process," but also implicate the First Amendment.

The FCC is the gatekeeper as to who is allowed to be a broadcaster. Its decisions as to who is disqualified from this public trust must be above reproach and not be tainted by improper trial tactics. This issue of lack of notice was raised before the D.C. Circuit, but not addressed.

> (e) The petition for writ of certiorari raises an important question of Federal law as to whether the FCC denied "due process" to Booker T. Wade, Jr., by disqualifying him based upon supposed representations by him which are not in the record?

The petition for writ of certiorari raises an important question of Federal law as to whether the FCC denied "due process" to Wade by disqualifying him based upon supposed representations by him which are not in the record. A Federal agency is required to base its decisions upon record evidence. 5 U.S.C. 706 (2) (F). The failure to do so is a basis for review by appellate courts.

The FCC found that Wade made intentional and knowing misrepresentations and lacked candor in not fully disclosing to it his involvement as an attorney in the affairs of the corporation (Jt. App. 53a). However, Wade did not testify at the hearing, because the FCC failed to subpoena him, and it declined to introduce into the record his

deposition testimony or written statements by him (Jt. App. 1a-40a). Thus, with no record evidence of any deceitful testimony or statements by Wade, there is no basis in law to disqualify him for intentional deceit.

Accordingly, certiorari should be granted. The actions of the FCC are in conflict with Morton v. Ruiz, 415 U.S. 199, 235 (1974), which requires Federal agencies to follow established rules and procedures. This issue was raised before the D.C. Circuit, but not addressed by it.

> (f) The petition for writ of certiorari raises an important Federal question of law as to whether the FCC denied "due process" to Rosa Ware, Booker T. Wade, Jr., Gwendolyn May-Barlow, and Hope Smith Bynum by disqualifying them based upon a supposed FCC policy which does not exist?

The petition for writ of certiorari raises an important question of Federal law as to whether the FCC denied "due process" to Ware, Wade, May-Barlow, and Bynum by disqualifying them based upon a supposed FCC policy which does not exist. Such actions by the FCC are in conflict with precedent of this Court.

The FCC does not have and never had a policy as to what constitutes a transfer of control of a non-commercial permittee or licensee because of changes in the board of directors, or because of the deletion of a director. Transfers of Control of Non-Stock Entities, 4 FCC Rcd 3403, para. 1, 3405, para. 14, n. 43 and 45 (1989); Seven Locks

Broadcasting Co., 94 FCC2d 899, 901-902 (1983). Thus, the legal premise of the HDO and of the FCC decisions, that as a result of Wade's involvement there was an unauthorized transfer of control of the corporate permittee because of changes in the composition of its board of directors and/or deletion of a director, is without any basis in law.

Although the FCC has authority to enforce the provisions of the Communications Act as to control of a permittee or licensee, it does not have authority to impose sanctions for violating a supposed policy which does not exist. It is contrary to fundamental principles of "due process" to sanction a party for conduct in which he or she had no notice was in violation of FCC policy. In Re Oliver, 333 U.S. 257, 273 (1948). See also, RKO General, Inc. v. FCC, 670 F.2d 215, 223-224 (D.C. Cir. 1981), an agency must give notice of its standards or policy and then apply that policy only after the policy is proclaimed to be in effect.

Regardless of the requirement of prior FCC approval for changes in directors of non-commercial entities, abdication of control or unauthorized transfer of control of a permittee or licensee is not disqualifying unless the abdication or transfer is accompanied by deceit. Silver Star 6 FCC Rcd at 6907, para. 20. See also, Spanish International Broadcasting, 2 FCC Rcd 3336, 3339, para. 20 (1987), unauthorized control was found which was not disclosed to the FCC, but no intent to conceal was inferred.

Where there is an abdication of control or unauthorized control, but which is not accompanied by deceit, FCC policy only requires the imposition of a

monetary forfeiture. Angel F. Ginorio, 9 FCC Rcd 698, 699 (1994). As previously noted, the FCC made no findings or conclusions of deceit by Ware, May-Barlow, or Bynum (Jt. App. 1a-40a). Thus, there is no basis in law to disqualify them for deceit as to abdication of control.

Accordingly, certiorari should be granted. The FCC disqualified Ware, Wade, May-Barlow, and Bynum based upon violation of a supposed FCC policy as to control of a non-profit entity which does not exist. This issue was raised before the D.C. Circuit, but not addressed by it.

CONCLUSIONS

WHEREFORE, in view of the foregoing, Ware, Wade, May-Barlow, and Bynum request that the Court grant certiorari and review the decisions of the FCC, and the decisions on appeal of the U.S. Court of Appeals for the D.C. Circuit, which improperly disqualified them as permittees or licensees of the FCC. The actions of the FCC are in conflict with fundamental principles of "due process" and are in conflict with precedent of this Court.

If the FCC's extralegal actions against Ware, Wade, May-Barlow, and Bynum are condoned --- putting them into an administrative hearing and disqualifying them with no semblance of fairness or "due process" --- then no broadcaster is safe from such regulatory abuse. Any broadcast station and its principals, who are not in favor with the FCC, for whatever reason, can be singled out with impunity for harassment or driven out of broadcasting. This is wholly contrary to the American system of justice.

Respectfully submitted,

By:_____

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